No. 17041

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MIKE TRAMA, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on November 17, 1959, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Secs. 151 *et seq.*).[1] The Board's decision and order (R. 28–33)[2] are reported at 125 NLRB 151. This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices hav-

[1] The relevant statutory provisions are reprinted *infra*, pp. 25–26.

[2] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

ing occurred near San Pedro, California, where respondent is engaged in the deep sea fishing business.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondent violated Section 8(a)(1) and (3) of the Act by threatening to discharge, and subsequently discharging, six crew members of the fishing vessel *Sandy Boy* for their failure to join Seine and Line Fishermen's Union of San Pedro (herein called Seine and Line). The Board relied on the following evidentiary facts.

A. Background

For several years prior to the summer of 1957, respondent was owner and master of the *Fisherman,* a deep-sea fishing vessel (R. 14–15; 42). In the summer of 1957, the *Fisherman's* crew consisted of Antoine Affidi, Vincenzo Bulone, Sal Lucca, Rosario Ruzza and Frank Ferrara, all of whom had worked for respondent at various times previously (R. 15; 42–44, 70, 124–125, 133–134). In operating the *Fisherman,* respondent had an agreement with Seine and Line and the members of the crew were members of that organization (R. 15; 44–45, 125, 134).

In the summer of 1957, another deep-sea fishing vessel, the *Sandy Boy,* was being constructed for respondent (R. 15; 45). The crew members of the *Fisherman* worked without compensation in helping to fit out the *Sandy Boy,* but with the understanding that they would work for respondent on the latter

[3] Respondent's contention that the Board improperly asserted jurisdiction in this proceeding is discussed *infra*, pp. 13–23.

vessel after its launching (R. 15; 45–46, 86–87, 117–118, 125–126). Respondent also hired Nicholas Mudry, a machinist, to install equipment on the *Sandy Boy,* with the understanding that Mudry would later serve as engineer on the vessel (R 15; 85–87, 101–102).

B. The unfair labor practices

The 1957 sardine season off the California coast opened on September 1 (R. 15; 70). None of the fishing vessels in San Pedro harbor worked in early September, however, as no agreement had been reached with the canneries on the price to be paid for catches (R. 15; 46–47). The *Sandy Boy* was ready to put to sea about September 6 (R. 46, 134–135). About two weeks later, respondent reached an agreement with Franco-Italian Packing Company whereby the latter agreed to buy respondent's catches at $80 a ton (R. 15; 48, 136). Thereupon, respondent spoke to John Calise, a business agent of Seine and Line, concerning an agreement covering the crew of the *Sandy Boy.* Calise stated that the contract for the *Fisherman* was applicable to the *Sandy Boy,* but indicated that he would not let Seine and Line members perform any fishing for respondent at that time. (R. 15–16; 48–49, 137). Respondent then went to Fishermen's Union, Local 33, ILWU (herein called Local 33) to see if something could be arranged with that organization (R. 16; 104). John Royal, an official of Local 33, told respondent that, if his crew desired to be represented by Local 33, a contract permitting fishing could be executed (R. 16; 50, 104–

105). Respondent then told Mudry, who had accompanied him on this visit to Royal's office, to get the crew to join Local 33 (R. 16; 88). Thereafter, respondent and Mudry told the crew members that they could go fishing if they joined Local 33 (R. 16; 88–89, 105). Mudry, Bulone and Ferrara signed authorizations for Local 33, and respondent subsequently entered into a contract with that organization covering the crew of the *Sandy Boy* (R. 16; 50–51, 138–139).

One September 27, the day the contract with Local 33 was executed, the *Sandy Boy* put out to sea (R. 51, 139). The next day it returned expecting to deliver its catch to Franco-Italian (R. 139). Upon the *Sandy Boy's* arrival at Franco-Italian, however, Seine and Line established a picket line at the discharge point, and unloading was delayed for several hours (R. 16; 51–53, 106–107, 139). Finally, the catch was accepted, and respondent delivered fish to Franco-Italian for the next several days (R. 16; 53). In early October, respondent temporarily ceased fishing for a few days due to the "full moon" (R. 53). When operations were resumed about October 17, respondent again brought a load of fish to Franco-Italian. A representative of the company, however, told respondent that neither that catch nor future ones could be accepted, because the cannery employees, who were members of a labor organization affiliated with Seine and Line, refused to handle them (R. 16; 54–55, 90–91).

During the following week, respondent spoke to officials of Seine and Line to ascertain what he could do to fish again (R. 55). Business Agent Calise told

respondent that he would have to sign a contract with Seine and Line and that his crew would have to pay fines and penalties in order to be reinstated as Seine and Line members (R. 16–17; 57–58). Respondent informed the *Sandy Boy's* crew of these conditions, but the crew members refused to accept the arrangement (R. 17; 60–62, 75). Respondent thereupon told Calise of the crew's decision, and the latter stated that respondent should force his crew to agree or else get a crew that would (R. 17; 62–63). Respondent next approached Local 33 for help, and was advised by one of its representatives that he could bring suit in federal court against Seine and Line for damages arising from the boycott situation (R. 17; 152–153). Respondent refused to take this course of action (R. 17; 153–154). An attempt by respondent to use the processes of the National Labor Relations Board to end the boycott also failed because respondent did not meet the Board's then current jurisdictional standards (R. 28–29, 14, n. 1, 19; 141–142).

In October, the *Sandy Boy's* crew discussed with respondent the possibility of bringing suit against Seine and Line in a State court and asked respondent to join them as a plaintiff (R. 17, 19; 142–143). Respondent refused to do this, so the crew members, on October 28, filed an action in State Court for loss of earnings, naming respondent as a defendant along with Franco-Italian, Seine and Line and others (R. 17, 19; 63–64, 143).

After the suit was instituted, respondent again met with Calise in an effort to get permission for the *Sandy Boy* to fish (R. 17; 73). Calise restated the

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conditions imposed earlier and added that the lawsuit would also have to be withdrawn (R. 17; 64–65, 73–74). Thereafter, respondent told the crew members on several occasions that if they wanted to fish again they would have to pay the required fines and penalties, be reinstated in Seine and Line, and drop their lawsuit (R. 17; 64–65, 75, 92–97, 108–109, 118–129, 145). Respondent also told the crew members that he was going to make things so miserable for them that they would quit (R. 97, 113, 114). In addition, he threatened them with discharge (R. 17; 66–67, 96–98, 111, 120–121). In his attempt to get the crew members to drop their legal action, respondent also presented them with a letter to sign which was addressed to their attorney and indicated that they wished to discontinue the State court suit (R. 92–93). The crew refused to pay the fines, seek reinstatement in Seine and Line, or drop their legal action (R. 93).

During most of November and December, the *Sandy Boy* remained idle (R. 117–118). For a few days in December, a temporary injunction secured by Franco-Italian permitted the vessel to operate, so respondent called the crew together, and during that period they fished (R. 18; 65–66, 78–79). Crew member Affidi was unavailable for work at that time as he was out of the country on a trip. Mudry was likewise unavailable, as he had secured a job elsewhere (R. 18; 98–99, 120). About December 28, respondent notified the crew members of the *Sandy Boy* that their employment was terminated as of December 31 (R. 68–69, 148). Respondent thereafter sent each member of the crew in-

cluding Affidi and Mudry, a letter informing the recipient that he was discharged (R. 19; 69, 158–161).

In January 1958, respondent obtained a new crew and resumed fishing operations (R. 18). From the time these operations commenced in 1958, respondent deducted from the earnings of each crew member amounts which were the same as those exacted from crews working under Seine and Line contracts (R. 18; 81–84). Those deductions differed from the amounts that had been deducted under respondent's contract with Local 33 (R. 18; 150). Several months later, the *Sandy Boy's* crew purportedly chose Seine and Line as their collective bargaining representative and respondent entered into a contract with that labor organization (R. 18; 82).

C. Respondent's business operations in 1957 and 1958

From the time the *Sandy Boy* was launched in September 1957, until the end of that year, respondent delivered fish to Franco-Italian valued in excess of $10,000 (R. 13–14; 129–130). That represented the sum realized from a few days fishing in September, October and December (R. 85). Because of the labor dispute in the latter months of 1957, it was not a representative figure, however (R. 14).

During the calendar year 1958, respondent's deliveries to Franco-Italian exceeded $78,000 in value (R. 14; 129–130). During the same period, Franco-Italian, in turn, shipped products valued in excess of $50,000 directly to points outside the State of California (R. 14; 157).

II. The Board's conclusions and order

Upon the foregoing facts, the Board, in agreement with the Trial Examiner, concluded that respondent violated Section 8 (a)(1) and (3) of the Act by threatening to discharge, and subsequently discharging on December 31, 1957, the crew members of the *Sandy Boy*. The discharges were effected, the Board found, because respondent believed that only by such action would Seine and Line permit him to deliver fish to the canneries. The Board concluded that the discharges of the six crew members were unlawful under Section 8(a)(3) because they had the effect of encouraging membership in Seine and Line and discouraging membership in Local 33 (R. 18–22).[4] In reaching its conclusions, the Board rejected respondent's contention that it lacked jurisdiction in this proceeding. The Board found that the value of respondent's catches in 1958, in excess of $78,000, met the Board's self-imposed jurisdictional standards, and

[4] The Board dismissed an allegation in the complaint that respondent violated Section 8(a)(1) of the Act when he informed the crew members in the latter part of September that Local 33 would accept them into membership, and that the *Sandy Boy* would be able to fish if he could work out a contract with that organization. Likewise dismissed was an allegation that Section 8(a)(1) was violated on the first occasion in October when respondent told the crew members that Seine and Line's boycott would be removed if they would pay their fines and penalties and become reinstated in that organization. The Board found that on both occasions respondent did no more than advise the crew of the conditions under which the *Sandy Boy* could resume fishing operations, and that in the circumstances, the conduct did not constitute interference with the right of the crew members to select their own bargaining representative (R. 21, 4).

that the purposes of the Act would be effectuated by the assertion of jurisdiction (R. 14, 28–29).

The Board's order requires respondent to cease and desist from the unfair labor practices found. Affirmatively, the order requires respondent to offer reinstatement to the six discharged employeees and to make them whole for any loss of earnings suffered between the date of their discriminatory discharges and March 21, 1958, and for the period subsequent to February 27, 1959.[5] The order also requires the posting of appropriate notices (R. 30–33).

SUMMARY OF ARGUMENT

I

The Board's findings that respondent threatened to discharge, and subsequently discharged, the crew members of the fishing vessel *Sandy Boy* in violation of Section 8(a) (1) and (3) of the Act are supported by substantial evidence. The credited evidence shows that the discharges were effected because the crew

[5] The backpay for which respondent is liable was tolled between March 21, 1958 and February 27, 1959, because on the former date the Regional Director for the 21st Region of the Board had refused to issue a complaint in this proceeding on the ground that respondent's operations did not meet the Board's jurisdictional standards. On February 27, 1959, respondent was informed that the Regional Director's prior administrative determination with respect to jurisdiction over respondent's operations was no longer being adhered to, and on that date the complaint herein was issued. In the exercise of its administrative discretion as to a remedy appropriate in the circumstances, the Board found that it would best effectuate the policies of the Act to suspend respondent's backpay obligation for the period in question (R. 29–30). See *Baltimore Transit Company*, 47 NLRB 109, 112–113, enforced, 140 F. 2d 51, 55 (C.A. 4).

members failed to pay fines and penalties and become reinstated in Seine and Line—the conditions which would have permitted respondent to resume fishing. The discharges were not justified by the pressures experienced by respondent resulting from his labor dispute with Seine and Line, for it is well settled that economic hardship does not exonerate an employer from his duty not to interfere with the protected right of his employees to freely choose their own bargaining agent.

II

Respondent's operations fall within the Board's legal jurisdiction and the determination of whether to assert this jurisdiction is a matter solely within the Board's discretion—the only limitation being that the Board not act arbitrarily or beyond its power. Respondent's contention that the Board in effect acted arbitrarily by asserting jurisdiction in this case is without merit. The fact that the Board previously refused to assert jurisdiction over respondent's operations in connection with another proceeding has no bearing on this case. The earlier refusal was not a license for respondent to commit unfair labor practices against the individuals named in this complaint.

The Board's assertion of jurisdiction in this case is based on its revised jurisdictional standards announced in 1958. At the time the standards were revised this case was pending before the Board and the revised standards were applied to it, although there had been an earlier ruling that under the previous standards the Board would not have asserted jurisdiction over respondent. The weight of judicial au-

thority confirms the power of the Board thus to apply to cases pending before it, revised jurisdictional standards promulgated subsequent to the occurrence of the unfair labor practices in issue. The contrary authority represented by this Court's decision in *N.L.R.B.* v. *Guy F. Atkinson,* 195 F. 2d 141 appears to have little vitality in view of subsequent decisions by the Supreme Court and by this Circuit. In any event, the *Atkinson* decision was based on its own peculiar facts, and this case is readily distinguishable. In contrast to *Atkinson,* the acts here were unlawful at the time they were committed, and any expectation that respondent may have had that it would not be held accountable for its conduct constitutes neither a legal nor an equitable defense to its statutory transgressions. *Atkinson* is further distinguishable on the ground that here the Board has fashioned an "equitable order" which has the effect of suspending respondent's backpay liability for the period during which there was an outstanding administrative determination that respondent did not meet the Board's jurisdictional standards. The Court's favorable comment in *Atkinson* concerning this type of order is authority for enforcement of the Board's order herein.

ARGUMENT

I. Substantial evidence supports the Board's finding that respondent threatened to discharge, and subsequently discharged, the crew members of the "Sandy Boy" and thereby violated Section 8(a) (1) and (3) of the Act

As the credited evidence shows *supra,* pp. 5–6, respondent, after learning from Business Agent Calise the conditions under which the *Sandy Boy* could resume fishing, threatened the crew members with

discharge if they did not pay fines and penalties and become reinstated as members of Seine and Line. That such conduct constitutes restraint, coercion and interference within the meaning of Section 8(a)(1) of the Act is too well settled to require citation.

The record also shows that respondent discharged the six crew members of the *Sandy Boy* on December 31, 1957, because they failed to heed his warning about joining Seine and Line. That such conduct violates Section 8(a) (1) and (3) of the Act is equally well settled. As stated in *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40:

> The policy of the Act is to insulate employees jobs from their organizational rights. Thus [Section 8(a)(3) was] designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.

In accord, see *N.L.R.B.* v. *Thomas Drayage & Rigging Co.*, 206 F. 2d 857, 859 (C.A. 9).

Concededly respondent was in a difficult position in the fall of 1957. Construction on the *Sandy Boy* had just been completed, and respondent wanted to commence fishing operations. But because of the labor difficulties with Seine and Line and the Union's boycott activities, only a fraction of the *Sandy Boy's* earning capacity was being realized. Respondent decided that the only way he would be permitted to use his vessel was by capitulating to the terms of Seine and Line. Accordingly, and as the Board

found, after the members of the *Sandy Boy's* crew refused to renew their affiliation with Seine and Line, respondent discharged the six of them, because he believed that only by such action would Seine and Line permit him to deliver fish to the canneries (R. 19–20). Though admittedly the exigencies of the situation may have seemed to respondent to require the discharges, the courts have made clear that economic hardship does not exonerate an employer from his duty not to interfere with the protected right of his employees to choose freely their own bargaining agent. *N.L.R.B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470 (C.A. 9); *N.L.R.B.* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 449 (C.A. 9; *N.L.R.B.* v. *John Englehorn & Sons*, 134 F. 2d 553, 557–558 (C.A. 3); *N.L.R.B.* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853–854 (C.A. 9).[6]

II. The Board properly asserted jurisdiction over respondent's operations

As shown *supra*, p. 7, during the calendar year 1958, respondent sold products valued at more than $78,000 to Franco-Italian which, in turn, shipped more than $50,000 worth of goods directly to points outside the State of California. Even though respondent's sales to Franco-Italian were made within the

[6] The naming of respondent as a defendant in the legal action brought by the crew members to recover lost earnings does not afford justification for their subsequent discharge, for the bringing of the suit was within the category of "concerted activities" protected by Section 7 of the Act. *Salt River Valley Water Users Assn.* v. *N.L.R.B.*, 206 F. 2d 325, 328 (C.A. 9); *N.L.R.B.* v. *Moss Planing Mill Co.*, 206 F. 2d 557, 559–560 (C.A. 4).

State of California, the fact that Franco-Italian sold across the State line is enough to establish that respondent's business affects interstate commerce. *Wayside Press* v. *N.L.R.B.,* 206 F 2d 862, 864 (C.A. 9); *Zall* v. *N.L.R.B.,* 202 F 2d 499, 500 (C.A. 9); *N.L.R.B.* v. *Sunshine Mining Co.,* 110 F. 2d 780, 784–785 (C.A. 9), certiorari denied, 312 U.S. 678. Further, since "the operation of the Act does not depend on any particular volume of commerce" (*N.L.R.B.* v. *Fainblatt,* 306 U.S. 601, 607), and the volume of respondent's annual sales to Franco-Italian was "not negligible" (*N.L.R.B.* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 684), there is no question that the Board has legal jurisdiction over respondent's operations. *N.L.R.B.* v. *Stoller,* 207 F. 2d 305, 306–307 (C.A. 9), certiorari denied, 347 U.S. 919; *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 144 (C.A. 9), certiorari denied, 348 U.S. 917.[7]

[7] Because respondent's business was curtailed in the latter part of 1957 as a result of the labor dispute involving the *Sandy Boy*'s crew, the Board followed its customary practice of considering the volume of business done in a period when operations were normal, in this instance the calendar year 1958, as an indication of the effect of respondent's operations on interstate commerce. Although the Board's policy may result, as in the instant case, in the consideration of a period which is not the one in which the unfair labor practices occurred, it is plain that if the Board's practice were not followed, strikes could result in depriving the Board of jurisdiction at times when its adjudicatory powers were most needed to adjudicate causes of labor controversies resulting in interruptions to the flow of interstate commerce. See *Essex County and Vicinity District Council of Carpenters, AFL,* 95 NLRB 969, 971; *Hygienic Sanitation Co.,* 118 NLRB 1030, 1031.

"The general rule is that, where the Board has jurisdiction, as it had in this case, whether such jurisdiction should be exercised is for the Board, not the courts to determine." *N.L.R.B.* v. *Stoller, supra,* 207 F. 2d at 307. Accord: *N.L.R.B.* v. *Denver Building & Construction Trades Council, supra,* 341 U.S. at 684; *N.L.R.B.* v. *Jones Lumber Co.,* 245 F. 2d 388, 390–391 (C.A. 9). The Board's exercise of discretion in such matters will not be disturbed unless it "was contrary to the intent of Congress, was arbitrary, [or] was beyond its power." *Office Employees International Union* v. *N.L.R.B.,* 353 U.S. 313, 320; *N.L.R.B.* v. *Jones Lumber Co., supra,* 245 F. 2d at 391 (C.A. 9); *N.L.R.B.* v. *Townsend,* 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U.S. 909. We show below that the Board did not exceed its authority or abuse its discretion by asserting jurisdiction in this case.

Respondent relies upon two propositions in contending that the Board improperly asserted jurisdiction in this case. First, it is argued that abstention is indicated by the fact that in the fall of 1957 when respondent sought the aid of the Board in respect to the boycott being pursued by Seine and Line, respondent was told that it did not meet the Board's jurisdictional standards. Similar reliance is placed by respondent upon the fact that in the spring of 1958, when it petitioned the Board for an election under the provisions of Section 9(c)(1)(B) of the Act to determine its employees' choice of representatives, jurisdiction was again declined for lack of a suf-

ficient volume of business to meet the Board's standards. Respondent argues that because of those two declinations of jurisdiction, the Board is foreclosed in this proceeding from asserting jurisdiction. Those were different cases, however, and involved different facts. As the Trial Examiner stated, respondent's "inability to obtain relief from the Board in respect to [those cases] does not license it to commit unfair labor practices against the individuals named in this complaint" (R. 14, n. 1). This Court took the same view regarding a similar contention only recently when it stated (*N.L.R.B.* v. *Local Union No. 751, United Brotherhood of Carpenters and Joiners of America, et al.,* No. 16,676, decided December 28, 1960, sl. op. 7):

> If and when the Board arbitrarily refuses to assert jurisdiction, a court order may be obtained requiring the Board to act.[5] But such a refusal, past or prospective, provides no ground for setting aside an otherwise valid order entered by the Board in a different proceeding. See *National Labor Relations Board* v. *Reed,* 9 Cir., 206 F. 2d 184, 190.

[5] *Hotel Employees Local No. 255, Hotel and Restaurant Employees and Bartenders International Union* v. *Leedom,* 358 U.S. 99; *Office Employees International Union, Local 11* v. *National Labor Relations Board,* 353 U.S. 313. [8]

Respondent's second argument against the Board's assertion of jurisdiction in this case is that the Board applied its current jurisdictional standards, rather than those it had been applying at the time of the

[8] And see *N.L.R.B.* v. *Gene Compton's Corporation,* 262 F. 2d 653, 656 (C.A. 9).

commission of the unfair labor practices.[9] Respondent thus contends in substance that the Board may not apply the sanctions of the Act to violations thereof if the violations occurred at a time when respondent's business did not satisfy the Board's then existing standards for asserting jurisdiction. Acceptance of this argument would largely negate the deterrent effects of the Act in a broad area within the Board's jurisdiction.

It has long been recognized that the Act bestows upon the Board broad discretion to assert, or to de-

[9] At the time of the commission of the unfair labor practices, the Board, pursuant to standards announced in *Jonesboro Grain Drying Cooperative*, 110 N.L.R.B. 481, 484, was asserting jurisdiction, *inter alia*, over enterprises shipping indirectly to out-of-state users goods or products valued at $100,000 or more. However, in a press release dated October 2, 1958 (42 LRRM 96–97) and a decision issued November 14, 1958 (*Siemons Mailing Service*, 122 NLRB 81, 84–85) the Board announced that it would apply to all "future and pending" cases involving nonretail concerns a revised standard under which it would assert jurisdiction over all concerns falling within its statutory jurisdiction having an indirect outflow across state lines of $50,000 or more. At the time the revised policy was announced, the present case was pending on appeal to the General Counsel (see Section 102.19 of the Board's Rules and Regulations, 29 C.F.R. 102.19) from action taken by the Regional Director on March 21, 1958, in refusing to issue a complaint on the ground that respondent's operations did not meet the Board's jurisdictional standards (R. 29). Because the case was before the General Counsel on appeal at the time the revised policy was announced, the Board concluded that the case was "pending," and that therefore the new jurisdictional standards were applicable (R. 29). In making this determination, the Board found its decision in *Wausau Building and Construction Trades Council*, 123 NLRB 1484, to be "clearly distinguishable" on the ground that in that case the General Counsel revived a charge which he had properly dismissed under previously existing jurisdictional standards (R. 29).

cline, jurisdiction in particular cases coming before it, whether for policy, budgetary, or other reasons. See *N.L.R.B.* v. *Indiana & Michigan Electric Co.,* 318 U.S. 9, 18–19; *Haleston Drug Stores, Inc.* v. *N.L.R.B.,* 187 F. 2d 418, 421–422 (C.A. 9), certiorari denied, 342 U.S. 815. In 1954, because inadequate funds prevented it from considering properly and expeditiously all of the cases reaching it, the Board, by means of its self-imposed jurisdictional limitations, severely restricted the number of cases in which it would assert jurisdiction, *Breeding Transfer Company,* 110 NLRB 493. As a result of the Supreme Court's opinion in *Guss* v. *Utah Labor Relations Board,* 353 U.S. 1, 10, pointing out that the Board's failure to assert jurisdiction had resulted in "a vast no-man's-land, subject to regulation by no agency or court," and subsequent increased appropriations, the Board, during the pendency of the present case before it, announced that it would exercise its statutory jurisdiction to a larger extent. *Siemons Mailing Service,* 122 NLRB 81. Viewing the self-limiting standards announced in 1954 and 1958 in the light of these purposes, obviously matters of Board discretion, respondent's argument that the 1954 standards granted it an immunity from prosecution for violation of the Act "can be seen to be an unusual one indeed." *N.L.R.B.* v. *Pease Oil Company,* 279 F. 2d 135, 137 (C.A. 2). For, "[t]he policy of the Board not to assert jurisdiction over a given situation at a given time does not license a company that comes within the purview of the Act to commit unfair labor practices at will." *N.L.R.B.* v. *Guernsey-Muskingum Electric*

Cooperative, decided December 13, 1960, 47 LRRM 2260, 2261 (C.A. 6). "An Act of Congress imposes a duty of obedience unrelated to the threat of punishment for disobedience." *Pease Oil Company, supra,* 279 F. 2d at 137. See also, *United Mine Workers* v. *Arkansas Oak Flooring,* 351 U.S. 62, 73–74; *N.L.R.B.* v. *Gottfried Baking Co.,* 210 F. 2d 772, 781 (C.A. 2).

Any doubt concerning the applicability of the stated principle to this Act was dispelled by the Supreme Court's decision in *Guss* v. *Utah Labor Relations Board, supra,* holding in substance that even though the Board may not exercise legal jurisdiction to the fullest extent, the policies and prohibitions of the Act are nonetheless applicable to business activities "affecting commerce" and that they supersede other principles of law within the sphere of the Act's provisions. The *Guss* decision was specifically relied upon by the Board in 1958 when it announced that its new standards would apply to all cases then pending, as well as to future cases. The Board said (*Siemons Mailing Service, supra,* 122 NLRB at 84–85):

> * * * the Board does not believe that the mere fact that a respondent had reason to believe by virtue of the Board's announced jurisdictional policies that the Board would not assert jurisdiction over it, gave it any legal, moral, or equitable right to violate the provisions of the Act * * *. This is especially true since the issuance of the *Guss* decision, which eliminated all possible basis for believing that in such circumstances the provisions of the Act did not

> apply, or that State law would or could apply to its conduct. In the final analysis what is conclusive with us is the fact that any other policy would benefit the party whose actions transgressed the provisions of the Act at the expense of the victim of such actions and of public policy.

Consistent with the foregoing, the courts have almost uniformly upheld the Board's power to apply to cases pending before it, revised jurisdictional standards promulgated subsequent to the occurrence of the unfair labor practices in issue. See *N.L.R.B.* v. *Pease Oil Co., supra.*; *N.L.R.B.* v. *Guernsey-Muskingum Electric Cooperative, supra*; *Optical Workers Union* v. *N.L.R.B.*, 229 F. 2d 170, 171 (C.A. 5), certiorari denied, 351 U.S. 963; *Local Union No. 12, Progressive Mine Workers* v. *N.L.R.B.*, 189 F. 2d 1, 4–5 (C.A. 7), certiorari denied 342 U.S. 868; cf. *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 378–379 (C.A. 9); *N.L.R.B.* v. *Herald Publishing Co.*, 239 F. 2d 410, 411–412 (C. A. 9); *N.L.R.B.* v. *Kartarik, Inc.*, 227 F. 2d 190, 192 (C.A. 8); *N.L.R.B.* v. *F. M. Reeves and Sons, Inc.*, 273 F. 2d 710, 712 (C.A. 10); *Leedom* v. *International Brotherhood of Electrical Workers, Local Union 108*, 278 F. 2d 237, 240–244 (C.A. D.C.).

The principal contrary authority, and the one upon which respondent relied before the Board, is represented by this Court's decision in *N.L.R.B.* v. *Guy F. Atkison,* 195 F. 2d 141. That case was decided, however, before the Supreme Court in *Guss* confirmed the preemptive sweep of the Act's prohibitions, regardless of their enforcement. Moreover, as the Second Circuit

noted in *Pease Oil* (279 F. 2d at 139), the *Atkinson* case "appears to have been overruled, *sub silentio*, by subsequent cases" in this Circuit, citing, *N.L.R.B.* v. *Daboll,* 216 F. 2d 143, 144, certiorari denied, 348 U.S. 917; *N.L.R.B.* v. *Jones Lumber Co.*, 245 F. 2d 388, 391; *N.L.R.B.* v. *Olaa Sugar Co.*, 242 F. 2d 714, 720–721. And see, *N.L.R.B.* v. *Forest Lawn Memorial Park Association,* 206 F. 2d 569, 571 (C.A. 9), certiorari denied 347 U.S. 915.

To the extent that *Atkinson* may retain any vitality, however, it is submitted that the instant case is distinguishable. For *Atkinson* involved a closed-shop contract in the construction industry executed when such contracts were valid, and the Board did not take jurisdiction over any cases in that industry. Hence, the employer was "innocent of any conscious violation of the Act." 195 F. 2d at 149. Here, in contrast, the threats and discharges effected by respondent were unlawful at the time of their commission, and respondent knew to the same extent that any other employer would know, that such acts constituted unfair labor practices. The fact that respondent may have had an "expectation that it might pursue whatever labor policy it saw fit, safe from any Board interference no matter how many violations of the Act it might commit," constitutes neither a legal nor an equitable defense to its statutory transgressions. *N.L.R.B.* v. *Pease Oil Co., supra,* 279 F. 2d at 137; *N.L.R.B.* v. *Guernsey-Muskingum Electric Cooperative, supra,* 47 LRRM at 2261.[10]

[10] The fact that respondent was specifically informed by the Board's Regional Office in the fall of 1957 that it did not meet the Board's jurisdictional standards, places respondent in no

Further warrant for distinguishing this case from *Atkinson* is found in the Board's effort herein to fashion what is referred to in *Atkinson* as an "equitable order." 195 F. 2d at 146. Thus, in *Atkinson,* the Court alluded with approval to *N.L.R.B.* v. *Baltimore Transit Co.,* 140 F. 2d 150, 155, certiorari denied, 321 U.S. 795, where the Fourth Circuit enforced a Board order in 47 N.L.R.B. 109, 112–113, which had been specifically designed to avoid retroactive application of sanctions to a period when the Board, on the basis of an administrative determination, considered itself as lacking jurisdiction over the employer's business. The Board in the instant case, citing *Baltimore Transit* as precedent (R. 30–31), similarly has limited the amount of back pay for which respondent is liable by excluding the period between March 21, 1958 and February 27, 1959, during which there was an outstanding administrative determination by the Regional Director that the Board lacked jurisdiction over re-

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different position that any employer who assumes that he can commit unfair labor practices because his volume of business does not meet the Board's published standards. See the *Pease Oil* and *Guernsey-Muskingum* decisions. Nor for that matter, is there any distinction between this situation and the one where employees engage in concerted activities with the expectation that they will be protected by the sanctions of the Act, only to have their expectation disappointed by the Board's retroactive application of standards excluding their employer from the Board's jurisdiction. Neither an employer nor employees have any "legally cognizable right in any particular Board jurisdictional policy." *Local Union No. 12, Progressive Mine Workers* v. *N.L.R.B., supra,* 189 F. 2d at 5; and see *Optical Workers Union* v. *N.L.R.B.*, 227 F. 2d 687, 691 (C.A. 5), on rehearing 229 F. 2d 170, 171, certiorari denied, 351 U.S. 963.

spondent's business. See p. 9, n. 5, *supra*. As suggested in *Atkinson*, therefore, we submit that the Court should approve the Board's "exercise of its administrative discretion in an endeavor to make an equitable order" 195 F. 2d at 146.[11]

CONCLUSION

It is respectfully submitted that a decree should issue enforcing the Board's order in full.[12]

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[11] Regardless of the Court's disposition of the reinstatement and back pay provisions of the order herein, the cease and desist portions, which operate prospectively, should be enforced. *Atkinson*, *supra*, 195 F. 2d at 151; *N.L.R.B.* v. *Gottfried Baking Co.*, 210 F. 2d 772, 781 (C.A. 2); *N.L.R.B.* v. *National Container Corp.*, 211 F. 2d 525, 534 (C.A. 2).

[12] In a further challenge to the Board's order on jurisdictional grounds, respondent relies on a Board decision issued in July 1960, about eight months after entry of the order herein, in which the Board dismissed a representation proceeding involving respondent's employees (Case No. 21–RC–6233) for the reason that data for the calendar year 1959 indicated that re-

spondent's indirect outflow had fallen below $50,000 annually, and that therefore respondent, during that period, did not meet the Board's jurisdictional standard. See *Fisherman's Cooperative Association, et al.*, 128 NLRB No. 11. This and other courts have recognized, however, that if the Board properly has jurisdiction in a proceeding in the first instance, enforcement of its order may not be denied merely because subsequent events indicate that the employer no longer meets the Board's jurisdictional requirements. *N.L.R.B.* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 241–242 (C.A. 9), *certiorari denied*, 326 U.S. 735; *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 378–379; *N.L.R.B.* v. *Katarik, Inc.*, 227 F. 2d 190, 192 (C.A. 8); *N.L.R.B.* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C.A. 5); and see *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 104, n. 16.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

Representatives and Elections

Sec. 9 * * * (c)(1) Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board—

* * * * *

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * *

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